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No. 91-1617

Supreme Court, U.S.
FILED
JUN 10 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM C. HULS AND MARSDEN W. MILLER, JR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, after petitioners' mail fraud convictions were reversed under *McNally* v. *United States*, 483 U.S. 350 (1987), and a new indictment charging a valid theory was returned, the court of appeals should have determined whether the evidence at petitioners' first trial was sufficient under the theory charged in the second indictment.

2. Whether, because the government initially indicted and tried petitioners on mail fraud charges resting on the invalid "intangible rights" theory, the Double Jeopardy Clause bars petitioners' trial on a new indictment charging them under the valid "deprivation of property" theory.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 952 F.2d 866. The opinion of the district court (Pet. App. 17a-52a) is not reported. A prior opinion of the court of appeals in this case is reported at 841 F.2d 109.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1992. A petition for rehearing was denied on February 24, 1992. Pet. App. 53a. The petition for a writ of certiorari was filed on April 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners were the founders and principal owners of the Exploration Company of Louisiana (XCL), an oil and gas exploration business. In 1984, petitioner Huls became Secretary of the Louisiana Department of Natural Resources. Two years later, petitioners were indicted by a federal grand jury sitting in the Middle District of Louisiana. The indictment charged them with 15 counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy to commit those offenses, in violation of 18 U.S.C. 371. The indictment alleged that petitioners conspired to allow Huls to maintain a substantial economic interest in XCL, while hiding that interest because Huls performed official acts that were beneficial to XCL. The conspiracy count charged that petitioners' actions defrauded the citizens of the State of Louisiana of their right to the honest and faithful services of Huls, and of their right to have various state governmental entities administered honestly, fairly, and free from corruption. The substantive counts alleged specific acts in furtherance of the scheme. Pet. App. 17a-18a.

Both petitioners were convicted on the conspiracy count and on two of the substantive counts; Huls was convicted on a third substantive count as well. The jury acquitted them on the remaining counts. The court of appeals reversed their convictions because the case was tried on the intangible rights theory that was disapproved in *McNally* v. *United States*, 483 U.S. 350 (1987). See Pet. App. 18a.

2. Petitioners were then reindicted on six counts—five of mail fraud and one of conspiracy. This time the indictment alleged that petitioners conspired to "obtain property rights of the State and to retain those

property rights" by false pretenses, representations, and promises. Pet. App. 18a. Petitioners moved to dismiss the second indictment on double jeopardy and collateral estoppel grounds. The district court denied those motions because petitioners were not exposed to a "property rights" theory of mail fraud liability at their first trial. *Id.* at 17a-34a, 39a-46a.[1]

3. Petitioners took an interlocutory appeal in which they renewed their arguments and additionally claimed that this Court's ruling in *Grady* v. *Corbin*, 495 U.S. 508 (1990), barred the government from presenting in the second indictment a theory that it could have presented in the first indictment, but did not. The court of appeals affirmed. Pet. App. 1a-16a. Citing an unbroken line of precedent, the court pointed out that the Double Jeopardy Clause does not forbid retrial of a defendant whose conviction is reversed because of an error in the proceedings. *Id.* at 5a-6a. The court pointed out that petitioners' convictions had been reversed because of defects in the indictment and the jury instructions, so there was nothing to prevent petitioners' retrial on a new indictment. *Id.* at 6a-7a.

The court of appeals also declined to reach petitioners' claims that there was insufficient evidence at their first trial to support the second indictment's deprivation of property rights theory. Relying on *Richardson* v. *United States*, 468 U.S. 317 (1984),

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[1] The district court dismissed two substantive counts that were not part of the original indictment on the ground that they were the result of vindictive prosecution. The district court also struck certain allegations from the conspiracy count. Pet. App. 4a, 34a-39a. The government appealed the latter ruling, but not the ruling dismissing the two substantive counts. The court of appeals dismissed the government's appeal. Those rulings are not at issue here.

the court held that because petitioners' convictions had been reversed, jeopardy had not terminated, so petitioners were not entitled to a review of the sufficiency of the proof at their first trial. Pet. App. 8a-12a.[2]

ARGUMENT

1. Petitioners first contend, Pet. 7-10, that the court of appeals should have assessed the sufficiency of the evidence at their first trial under the theory charged in petitioners' second indictment. That contention is unsound. Because only the intangible rights theory was charged in the first indictment, the evidence presented at trial necessarily bore only on the intangible rights theory. It would be pointless to ask whether the evidence would have supported a conviction under the deprivation of property theory, because the case was not tried on that theory. It would be entirely fortuitous if the evidence offered in support of a charged theory also happened to support a theory that was not charged, and it is hard to imagine any interest protected by the Double Jeopardy Clause that should turn on whether the evidence at the first trial might have been sufficient to support a conviction on a theory that was not charged in that case.[3] At the

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[2] The court of appeals also dismissed petitioners' challenge to the validity of the indictment; the court held that it did not have jurisdiction to determine that issue on interlocutory appeal. Petitioners have not pressed that point here.

[3] A simple example may illustrate this point. Suppose the government charged the defendant with murder of a federal agent, and identified that agent as A. Suppose further that the court of appeals reversed the conviction on the ground that A was not a federal agent at the time of the murder, but that B, who accompanied A and was also murdered, was the one who was a federal agent. Surely, the permissibility of

second trial, the government will be obliged to present evidence sufficient to satisfy the deprivation of money or property rights theory; that presentation may include evidence that was not introduced at the first trial. *United States* v. *Davis*, 873 F.2d 900, 907 (6th Cir.), cert. denied, 493 U.S. 923 (1989). Should the government fail to meet its burden of proof, petitioners will be entitled to an acquittal. But they are not now entitled to a review of the sufficiency of the evidence presented at petitioners' trial on the intangible rights theory and a determination whether it was sufficient to support convictions on a different theory of criminal liability.

No decision of this Court has addressed the precise question presented by petitioners. However, in *Richardson* v. *United States*, *supra*, the Court held that when a prosecution ends in a mistrial because of a hung jury, a defendant is not entitled to a review of the sufficiency of the evidence before he is retried. The Court rejected the contention that the reasoning of *Burks* v. *United States*, 437 U.S. 1 (1978), requires that type of review. The Court explained that *Burks* held only that "once a defendant obtained an unreversed appellate ruling that the Government had failed to introduce sufficient evidence to convict him at trial, a second trial was barred by the Double Jeopardy Clause." 468 U.S. at 323. The Court made clear that *Burks* did not "[lay] down some overriding principle of double jeopardy law that was applicable across the board in situations totally different from the facts out of which it arose." *Ibid.* The Court held that the Double Jeopardy Clause did not entitle the defendant

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trying the defendant for the murder of B should not turn on whether, at the trial for the murder of A, there happened to be evidence that the defendant murdered B as well.

in *Richardson* to a determination on the issue of evidentiary sufficiency, because the Clause "by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Id.* at 325.

As the court of appeals recognized, Pet. App. 8a-12a, the reasoning of *Richardson* is controlling here. A reversal on appeal based on a defect in the indictment and jury instructions is no more the equivalent of an acquittal than is a mistrial based upon a hung jury. In terms of the language of the Double Jeopardy Clause and the interests it serves, it is hard to imagine why defendants, having no right to a determination of the sufficiency of the evidence when a jury deadlocks, should be entitled to such a determination following a conviction that is reversed because of an error in the charging instrument. Surely, the defendant has no greater interest in a determination of the sufficiency of the evidence against him in that situation than in the situation at issue in *Richardson*. Likewise, the public's interest in an error-free determination of the defendant's guilt is in no way diminished. See *United States* v. *Tateo*, 377 U.S. 463, 466 (1964). There simply has been no "event" equivalent to an acquittal that might be said to terminate the defendant's "jeopardy." In short, the court of appeals' decision correctly follows from *Richardson*.

The decision below is not in conflict on this issue with the decision of any other court of appeals. The petition does not cite any case—and we are aware of none—in which a court of appeals reversed a conviction because the indictment failed to charge an offense, but the court nevertheless reviewed the sufficiency of the evidence. Indeed, the Sixth Circuit rejected a claim identical to petitioners' in a case involving pre-

cisely the same procedural setting as in this case, and this Court denied certiorari. *United States* v. *Davis*, *supra*. There, as in this case, the defendant was indicted and convicted on mail fraud charges under an intangible rights theory. After *McNally* was decided, the Sixth Circuit reversed his conviction. The government then brought a second mail fraud indictment premised on the "money or property rights" theory, and Davis moved to dismiss the second indictment. On his interlocutory appeal from the denial of that ruling, the defendant argued, like petitioners, that the court of appeals should determine whether the evidence at his first trial was sufficient to prove the new charges. The Sixth Circuit declined to do so for the same reasons that we have advanced here. 873 F.2d at 907-908. Accord *United States* v. *Porter*, 807 F.2d 21, 23-24 (1st Cir. 1986).[4]

2. Petitioners also argue (Pet. 11-14) that the government should be precluded from retrying them on a different mail fraud theory than was originally charged, because the government had the option of

[4] Petitioners cite several cases that suggest or require that an appellate court should pass on the sufficiency of the evidence when it finds reversible error other than that the indictment failed to charge an offense. See, *e.g.*, *United States* v. *Szado*, 912 F.2d 390, 39 (9th Cir. 1990) (right to jury trial before magistrate); *United States* v. *Quinn*, 901 F.2d 522, 529 n.5 (6th Cir. 1990) (erroneous admission of evidence); *United States* v. *Douglas*, 874 F.2d 1145, 1149-1151 (7th Cir.) (erroneous jury instructions), cert. denied, 493 U.S. 841 (1989); *Vogel v. Pennsylvania*, 790 F.2d 368, 376 (3d Cir. 1986) (erroneous placement of burden of proof on insanity). None of those cases suggests, however, that the propriety of retrying a defendant whose conviction was reversed on account of a failure to charge an offense should depend on whether the evidence was sufficient to establish a theory that was not charged.

bringing charges under the "money or property" theory at the time of the original charges but failed to do so. This claim is contrary to well-settled law.

In *United States* v. *Ball*, 163 U.S. 662 (1896), this Court held that the Double Jeopardy Clause did not bar a defendant's retrial on a charge of murder after his conviction had been reversed because of a defect in the indictment. Similarly, in *Montana* v. *Hall*, 481 U.S. 400 (1987), the Court concluded that a defendant could be reprosecuted after his first conviction had been reversed because the indictment was based on a statute that did not apply to his actions at the relevant time. These cases exemplify a "venerable principle[]" of double jeopardy jurisprudence: "The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict * * * poses no bar to further prosecution on the same charge." *United States* v. *Scott*, 437 U.S. 82, 90-91 (1978); accord, *e.g.*, *Burks* v. *United States*, 437 U.S. 1, 13-14 (1978).

That principle governs this case. Petitioners' prior convictions were reversed because of a deficiency in the original indictment, but because of insufficiency of the evidence. Consequently, petitioners may be retried. As this Court held in *Montana* v. *Hall*, 481 U.S. at 404, "[i]t is clear that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument."

Petitioners nevertheless argue that because the government could have brought the original indictment under the deprivation of property rights theory, the government's "tactical choice" to charge under the intangible rights theory should preclude petitioners' trial on the new indictment. Acceptance of that position would effectively repudiate the rule of *Ball* and

Montana v. *Hall*, *supra*. Although the theory on which the first indictment was based turned out to be legally flawed and not to support a conviction, the same was true in *Ball* and *Montana* v. *Hall*. In each of those cases, moreover, the prosecutor went to trial on an invalid charge, yet the prosecutor's error in those cases did not result in a double jeopardy bar to a second prosecution. Indeed, the prosecutor's error in this case was understandable, because at the time of the first indictment, the courts of appeals were unanimous in upholding the "intangible rights" theory of mail fraud. See *United States* v. *Davis*, 873 F.2d at 905. This court's subsequent decision in *McNally* does not call into question the reasonableness of the government's charging decision in the original indictment in this case.

Consequently, this case is unlike the decisions on which petitioners rely and does not conflict with the decision of any other court of appeals.[5] Nor does

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[5] For example, in *United States* v. *Cavanaugh*, 948 F.2d 405 (8th Cir. 1991), the defendants were charged with both assault to inflict serious bodily injury and murder. The charged incident could have been viewed as either a separate assault and murder, or as a continuous crime culminating in murder. At trial, the prosecutor argued that the murder was the culmination of the assault, and, at the government's request, the trial judge instructed the jury that it should return a verdict on either the murder or the assault charge, but not both. As a result, the jury returned guilty verdicts on the murder charges but no verdicts on the assault charges. When the murder convictions were reversed for insufficient evidence, the prosecutor argued before the trial court that the assault charges were lesser included offenses of the murder charges and that the jury must have found the defendants guilty of the assault. On appeal from the district court's entry of judgments of conviction on the assault charge, the government conceded that the assault was not a lesser included

Grady v. *Corbin*, 495 U.S. 508 (1990), support their argument. *Grady* involved successive prosecutions, first for traffic violations and then for homicide and assault charges arising out of the traffic violations.

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offense of the murder charge, but the government argued that the assault convictions could stand as separate offenses. The court of appeals held that the assault charges were barred because the government had abandoned the separate assault theory at trial and had deliberately prevented the jury from deciding the assault counts. 948 F.2d at 410-417. Here, by contrast, the first indictment did not charge both the intangible rights theory and the deprivation of property theory of mail fraud, and the government did not "abandon" the deprivation of property theory or deprive the jury of an opportunity to return a verdict on a charged count. Conseqently, *Cavanaugh* is inapposite.

Saylor v. *Cornelius*, 845 F.2d 1401 (6th Cir. 1988), is similar to *Cavanaugh*. The defendant was charged with one count of murder that encompassed theories of culpability as an accomplice and as a conspirator. Inexplicably, the prosecutor acquiesced in a jury charge only on the theory of conspiracy, even though there was evidence supporting the accomplice theory. After the defendant's conviction was reversed in state court for lack of evidence, the court of appeals barred further trial on the accomplice theory. But in *United States* v. *Davis*, *supra*, the Sixth Circuit specifically held that its prior decision in *Saylor* was inapplicable in the precise circumstances present here, because only one mail fraud theory—intangible rights—was charged; the deprivation of property theory simply was not at issue at the first trial. 873 F.2d at 906.

Petitioners also rely on two district court decisions that refused to give the government a second chance to prove mail fraud violations after the defendants' indictments were reversed because they were brought under the intangible rights theory. See *United States* v. *Slay*, 717 F. Supp. 689 (E.D. Mo. 1989); *United States* v. *Gray*, 705 F. Supp. 1224 (E.D. Ky. 1988). For the reasons we have stated in the text, we believe those decisions are wrong, and in any event, they do not represent conflicting decisions at the appellate level.

In this case, petitioners have not "already been prosecuted" on mail fraud charges within the meaning of *Grady*, because their prior convictions have been reversed and are a nullity. Therefore, under conventional double jeopardy principles, petitioners' prior convictions do not bar their retrial on the new indictment.

In short, nothing in this Court's cases or double jeopardy principles suggests that the permissibility of a retrial should turn on whether an indictment can be characterized as the product of a deliberate decision not to charge an available theory of criminal liability. Petitioners successfully argued on appeal that their first indictment was invalid. In so doing, they waived their right to have their case concluded in a single trial and may therefore be subject to a second trial, this time under a proper theory of prosecution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1992

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